BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL D. HALLBAUER	)	
Claimant	)	
V.	)	
	)	
COMBINED INSURANCE COMPANY	)	Docket No. 1,066,323
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant, through Mitchell W. Rice, of Hutchinson, requested review of Administrative Law Judge Ali Marchant's September 29, 2014 Award. Douglas C. Hobbs, of Wichita, appeared for respondent and its insurance carrier (respondent). The Board heard oral argument on April 14, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant alleges he tripped on carpet and sustained accidental injuries on November 30, 2012. The judge found claimant did not prove his accidental injury arose out of and in the course of his employment because: (1) walking on carpet was not an employment risk and (2) claimant likely fell because of diabetic neuropathy in his feet. Claimant did not file an appeal brief with the Board, but argued his accidental injury arose out of and in the course of his employment. Claimant argues he caught his foot on a loose area of carpet and there is no medical opinion he fell because of his diabetes. Respondent maintains the Award should be affirmed, arguing claimant fell because of his diabetes, or due to a neutral risk with no particular employment character, or directly or indirectly from idiopathic causes.

The issues for the Board's review are:

1. did claimant's injury arise out of and in the course of his employment?

2. what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant has sold insurance for respondent since 1982. On November 30, 2012, claimant attended a mandatory meeting for respondent's Kansas employees at the Holiday Inn in Wichita. According to claimant, he finished lunch, returned to the meeting room, put down his computer and exited a hallway to go to the restroom.[1] Claimant testified Larry Weicken, a coworker, hollered at him. Claimant testified he looked at Mr. Weicken and something "caught" his foot, causing him to stumble about eight or nine feet.[2] Claimant struck his head and left shoulder on a brick or concrete wall protruding in the hallway. He was knocked unconscious. Claimant was transported to Wesley Medical Center.

At the time of his accident, claimant was not carrying anything. He was wearing leather-soled shoes. The meeting room and hallway had wall-to-wall carpeting. Claimant did not know if there was anything on the carpet which caused him to trip. He was unsure what caused his accident, stating: "I don't know whether the carpet was wrinkled. I don't know. Whether my foot caught, I don't know."[3]

Mr. Wiecken, who has worked as a salesperson for respondent for 27 years, witnessed the accident. He testified he and claimant are not friends, but competitors. Mr. Wiecken testified after a break, he headed from the restroom to the meeting room when:

> [Claimant] came out of the room, he turned and looked down the hallway, he saw me, he took a couple steps, says, Larry, and so I walked toward him. He took a couple more steps. I observed his right foot it's like it - - like he caught it on the carpet and stumbled, he went to his knees. When he hit his knees, he looked at me and said, "Oh, shit!" and fell forward.[4]

Mr. Wiecken testified he stumbled on the same low cut carpet earlier that day. He indicated the carpet seemed a "little softer" or "maybe . . . a little bit looser right there" and the carpet in the middle of the hallway was "not as tight" as on the sides of the hallway.[5] He indicated where he stumbled was in "close proximity" to where claimant stumbled.[6] Mr. Wiecken patted the carpet with his foot later that day and that particular area did not seem as tight. He did not notice any problems that warranted notifying hotel management.

---

[1] Claimant raises no argument as to the applicability of the personal comfort doctrine.

[2] Clmt. Depo. at 23.

[3] *Id.*

[4] Wiecken Depo. at 8; see also pp. 6-7, 10-11, 13, 18.

[5] *Id.* at 10, 26.

[6] *Id.* at 10.

At some unknown time subsequent to the accident, claimant and Mr. Wiecken discussed what had occurred. According to Mr. Wiecken, claimant asked him what happened and Mr. Wiecken told claimant he tripped and fell.

By the time of respondent's next meeting at Holiday Inn in Wichita several months later, Mr. Wiecken noticed the hotel carpet had been replaced, but he did not know why.

On January 3, 2013, respondent referred claimant to Bernard Hearon, M.D., for treatment. Dr. Hearon is board certified in orthopedic surgery, sports medicine and hand surgery. Dr. Hearon noted claimant fell at work. Dr. Hearon diagnosed claimant with various left shoulder ailments. Conservative treatment, including injections, physical therapy, medications and work restrictions, failed to provide sufficient relief. Dr. Hearon surgically repaired claimant's shoulder on February 25, 2013. Dr. Hearon released claimant to return to regular work on July 25, 2013. Dr. Hearon opined claimant required no additional treatment.

Dr. Hearon testified anybody who can raise their shoulder (or forward flex) up to 150° is generally "in the normal range."[7] Dr. Hearon testified he gave claimant a 1% impairment to the left shoulder pursuant to the AMA *Guides*[8] (hereafter *Guides*). His rating was only based on claimant's left shoulder forward flexion. Dr. Hearon testified even though the *Guides* allowed a 2% impairment based on claimant's left shoulder forward flexion, he provided a 1% impairment because he only used the *Guides* as a guide. Dr. Hearon believed it was not necessary to measure other range of motion because for most purposes, "those motions are not clinically significant."[9] Dr. Hearon acknowledged claimant was still undergoing physical therapy at the time of the range of motion testing.

C. Reiff Brown, M.D., who is board certified in orthopedic surgery, evaluated claimant at his attorney's request. Dr. Brown reviewed medical records and took a history. Dr. Brown's report stated claimant tripped on carpet and such fall caused his shoulder injury and need for treatment. Dr. Brown performed a limited physical examination because claimant just had left shoulder surgery. In an addendum report, Dr. Brown gave claimant a 7% permanent partial impairment to the left upper extremity for loss of range of motion pursuant to the *Guides*. Dr. Brown testified no impairment other than range of motion was appropriate. Dr. Brown also testified claimant's shoulder surgery did not fit within a table in the *Guides*. Dr. Brown gave claimant permanent restrictions. Dr. Brown testified claimant will not require any further medical care as long as he works within his restrictions.

---

[7] Hearon Depo. at 19.

[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

[9] Hearon Depo. at 19-20.

Claimant was evaluated at his attorney's request by Pedro Murati, M.D., who is board certified in physical medicine and rehabilitation, electrodiagnostics and independent medical evaluations. Dr. Murati stated claimant stumbled on carpet and fell. Dr. Murati opined claimant's accident caused his shoulder injuries and need for treatment. Dr. Murati gave claimant a 10% impairment for lost range of motion and a 10% impairment for his surgery for a combined 19% impairment to the left shoulder pursuant to the *Guides*. Dr. Murati testified claimant's surgical procedure is not listed in table 27 in the *Guides*, but he extrapolated the rating based on a listed surgical procedure.

Dr. Murati issued permanent work restrictions and testified claimant should undergo at least yearly follow-ups based on the risk of accelerated left shoulder arthritis due to the surgery. However, Dr. Murati acknowledged claimant may never need shoulder treatment.

Medical records regarding claimant's preexisting Type II diabetes were stipulated into evidence. Claimant has been treated for Type II diabetes since 1984. Claimant takes Metaglip and Gabapentin. On July 21, 2010, claimant saw Ty Schwertfeger, M.D., for severe painful foot numbness that prevented full-time employment and caused balance problems. Claimant reported his feet become "extremely sore, to the point that he can no longer stand" and he would wear shoes two sizes larger than his usual shoe size to alleviate some discomfort.[10] Dr. Schwertfeger diagnosed claimant with diabetic peripheral neuropathy. A July 27, 2010 EMG showed severe peripheral polyneuropathy most consistent with longstanding diabetes. Dr. Schwertfeger and claimant discussed "the clinical course of gradual progression and its effect on balance" and noted claimant "may require a cane in the future for better balance."[11] Claimant also testified he has lost consciousness twice in the past because of Type II diabetes.

On November 13, 2012, claimant saw Burtram Odenheimer, M.D., for his diabetic neuropathy. Claimant complained of foot pain, neuropathy and reported being able to "hardly walk."[12] Claimant reported sometimes not being able to tell "what [he is] walking on."[13] Claimant indicated his "gait is unsteady secondary to poor balance since 2010."[14] Dr. Odenheimer noted claimant had used a cane for two years and "occasionally falls."[15] Physical examination revealed claimant was slightly flatfooted and had a slight decreased tandem gait. Dr. Odenheimer diagnosed claimant with chronic peripheral neuropathy and chronic gait disturbances.

---

[10] Stipulation - Records of Ty Schwertfeger, M.D. (filed May 29, 2014) at 10.

[11] *Id.* at 3.

[12] Stipulation - Records of Burtram Odenheimer, M.D. (filed May 28, 2014) at 3.

[13] *Id.*

[14] *Id.*

[15] *Id.*

Claimant continues to have pain in his left shoulder. As a result of his accident, he testified he can no longer roll over in bed, has difficulty holding objects and only works a couple of days a week because of the pain. Before his accident, claimant was an account executive. He sold service policies to businesses and their employees. Subsequent to his accidental injury, claimant was demoted to being an agent because he no longer worked in the field.

On page six of the September 29, 2014 Award, the judge stated:

> The Claimant fell while walking in the hallway of a hotel. He was not carrying anything, and there is no evidence that there were any specific defects in the carpet that contributed to his fall. He was simply walking down a carpeted hallway where members of the general public could be on a daily basis and tripped and fell. His activity of walking on a flat carpeted surface did not carry any risk specific to his employment. The risk of tripping and falling [in] that hallway was equal among Respondent's employees and the general public. As a result, at a minimum, Claimant's fall arose out of a neutral risk with no particular employment character.
>
> The Court further notes that in light of the medical records of Dr. Schwertfeger and Dr. Odenheimer regarding the extent of Claimant's diabetic neuropathy in his legs and feet at the time of his fall, it is certainly possible and even likely that this personal condition contributed to the risk of his fall. He had previously reported balance problems related to the numbness he was experiencing in his feet, and NCT/EMG testing revealed "severe" axonal sensory motor peripheral polyneuropathy. The Court finds that it is more probable than not that Claimant's neuropathy in his feet likely contributed to the likelihood that he would have an unexplained fall.
>
> Based on the foregoing, the Court finds that, pursuant to K.S.A. 44-508(f)(3)(A), Claimant did not meet his burden to prove that his accidental injuries arose out of and in the course and scope of his employment with Respondent. Rather, his accident arose out of both a neutral risk and a personal risk, neither of which had anything to do with his employment with Respondent.

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[16] The burden of proof shall be on the claimant. The trier of fact shall consider the whole record.[17]

---

[16] K.S.A. 2012 Supp. 44-501b(b).

[17] K.S.A. 2012 Supp. 44-501b(c).

K.S.A. 2012 Supp. 44-508 provides:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.
>
> . . .
>
> (u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 2012 Supp. 44-510h(b)(2) states:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Board review of a judge's order is de novo on the record.[18] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[19] The Board, on de novo review, makes its own factual findings.[20]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[21] The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[22]

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[23]

---

[18] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[19] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[20] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[21] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[22] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[23] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

ANALYSIS

1. Claimant's accidental injury arose out of and in the course of his employment.

Whether an accident arises out of and in the course of the worker's employment depends on the facts of the particular case.[24] Claimant testified he stumbled on carpet and was knocked unconscious. He could not pinpoint the cause of his fall, other than saying something "caught" his foot. Basically, claimant did not know how his accident occurred.

The only eye witness with a good recollection of the accident, Mr. Wiecken, testified claimant caught his foot on the carpet and stumbled. Mr. Wiecken testified he also tripped and stumbled on the same carpet, in the same general area, earlier that morning. Mr. Wiecken provided the only testimony regarding the condition of the carpet – that it seemed looser, softer or not as taut in the area where claimant tripped or stumbled. The Board finds Mr. Wiecken's testimony credible and not contradicted.[25]

Under the particular facts of this case, claimant's accidental injury arose out of and in the course of his employment. Claimant's employment exposed him to the loose area of carpet which resulted in his accidental injury, i.e., there was a causal connection between the conditions under which the work was required to be performed and the resulting accident. Claimant was injured as a result of his employment. The accident was also the prevailing factor in claimant's injury and need for medical treatment. Thus, claimant proved the requirements under K.S.A. 2012 Supp. 44-508(f)(B).

Claimant's accidental injury was not due to a neutral risk. In *McCready,*[26] a claimant did not know why she fell after taking a step on her employer's sidewalk. The condition of the sidewalk had nothing to do with her fall. The Kansas Court of Appeals stated, "Unexplained falls at work are neutral risks."[27] *Hensley*[28] indicates a neutral risk has no particular employment or personal character. Here, claimant's fall was explained and work-related because the condition of the carpet caused his fall.

---

[24] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[25] The Board notes both claimant and Mr. Wiecken indicate the other person initiated an attempted conversation prior to the accident. Who started their attempted dialogue is immaterial.

[26] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 96, 200 P.3d 479 (2009).

[27] *Id.* at 81.

[28] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

Similarly, claimant's accident did not arise directly or indirectly from an idiopathic cause. "Doctors use the term idiopathic to refer to something for which the cause is unknown."[29] The cause of claimant's accidental injury is known – his foot became caught on loose carpet.

While there is evidence claimant's diabetic condition caused him foot numbness that required the use of a cane, to conclude he fell on the hotel carpet on November 30, 2012, because of his preexisting condition requires some degree of speculation. No medical expert identified claimant's diabetic neuropathy as the probable cause for his accidental injury. No lay witness indicated claimant simply fell for an unknown reason that might otherwise cause us to suspect claimant's diabetes caused the fall. Instead, the credible evidence is that claimant caught his foot on loose carpet. We conclude the evidence is insufficient to prove, more probably than not, that claimant's fall was the result of his personal and preexisting diabetic condition.

2. Claimant sustained a 7% functional impairment to the left shoulder.

The Board adopts the reasoning and findings of the judge that claimant sustained a 7% impairment to the left shoulder, as based on Dr. Brown's opinion.

At oral argument, claimant objected to Dr. Brown's opinion being admissible into evidence based on K.S.A. 2012 Supp. 44-510h(b)(2), but conceded there was probably no proof respondent paid for Dr. Brown's report as unauthorized medical. The record contains no proof showing admission of Dr. Brown's report violated K.S.A. 2012 Supp. 44-510h(b)(2).

CONCLUSIONS

Claimant's accidental injury arose out of and in the course of his employment. He sustained a 7% permanent impairment to the left shoulder.

AWARD

WHEREFORE, the Board modifies the September 29, 2014 Award.

Claimant is entitled to 27.43 weeks of temporary total disability compensation at the rate of $570 per week in the amount of $15,635.10, followed by 13.83 weeks of permanent partial disability compensation, at the rate of $570 per week, in the amount of $7,883.10 for a 7% loss of use of the shoulder, making a total award of $23,518.20.

---

[29] *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008), *aff'd* 291 Kan. 314, 241 P.3d 75 (2010). We voice no opinion as to whether the terms "neutral" and "idiopathic" overlap.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Mitchell W. Rice
mwr@mannlaw.kscoxmail.com
clb@mannlaw.kscoxmail.com

Douglas C. Hobbs
dch@wsabe.com
jkibbe@wallacesaunders.com

Honorable Ali Marchant